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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 207

RETAIL CLERKS UNION, 1550
RETAIL CLERKS INTERNATIONAL ASSOCIATION
AFL-CIO, *et al.*, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

and

THE KROGER CO., *Intervenor*

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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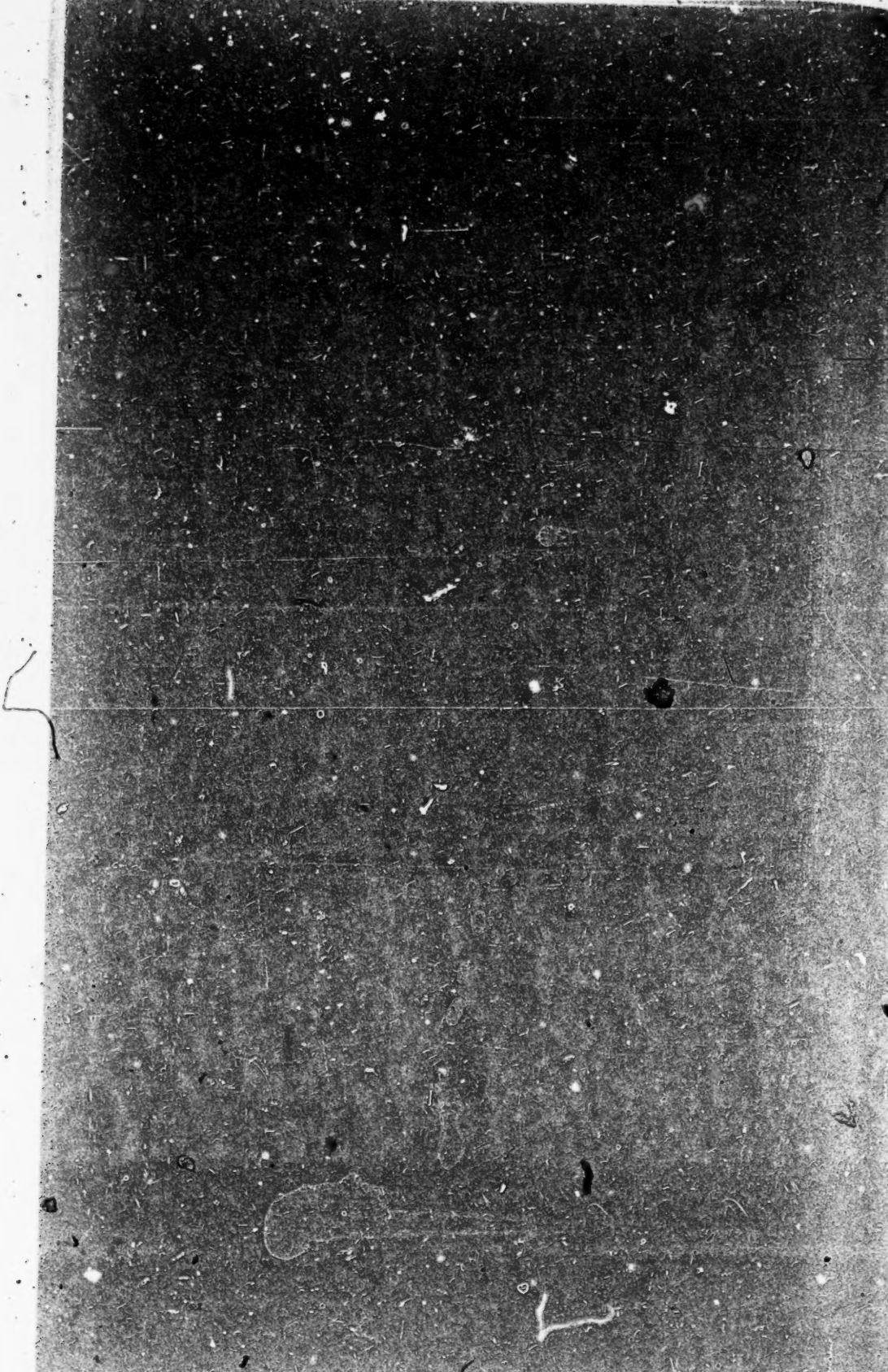

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CITATIONS

Cases:

Anderson Lithograph Co., 129 N.L.R.B. 920 (1959) *enforced sub nom*	fn 10
Belleville Employing Printers, 122 N.L.R.B. 350, 353	fn 10
Buffalo Linen Supply Co., 109 N.L.R.B. 447, 449	9, 11, 13
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Morgan Linen Service, Inc., 131 N.L.R.B. 420....fn 10

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Pacific Coast Association of Pulp and Paper Manufacturers v. *N.L.R.B.*, 304, F.2d 760 (C.A. 9) 14

STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)

Section 8(a)(1) 7

Section 8(a)(5) 7, 12

Section 8(b)(3) 12

Section 10(e) 2

MISCELLANEOUS:

Collective Bargaining Structure; The Employer Bargaining Unit, BLS Rep., p. 10 ..... fn 9

Major Union Contracts in the United States, 1961, U.S. Department of Labor, BLS Bul. No. 1353, p. 4 ..... fn 9

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ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgment of the Court of Appeals for the District of Columbia Circuit affirming an order of the National Labor Relations Board and denying a petition to set aside said order and remand the cause to the Board.

OPINIONS BELOW

The decision and order of the National Labor Relations Board (J.A. 388-395)[1], including the Intermediate Report

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[1] All record references are to be the Joint Appendix filed in the Court of Appeals.

of the Trial Examiner (J.A. 396-507), is reported at 141 NLRB 564 (1962). The opinion of the court of appeals (App. A, *infra.*, pp. 1a-12a) is reported at 330 F. 2d 210.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1964. On April 9, 1964, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including June 21, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act as amended.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board could properly find that when an employer is a member of a multi-employer bargaining unit, he may nonetheless refuse to execute a contract agreed to by the other employer-members of the unit and unilaterally insist upon separate negotiation of a particular mandatory subject of bargaining.

2. If the first question is answered affirmatively, whether the Board properly concluded that a number of mutually consented to post-contract adjustments of jointly-negotiated contracts, in order to accommodate those contracts to specialized conditions which were not of general concern to all the employer-members of the group, gave rise to a prerogative permitting any employer-member to unilaterally insist upon individual negotiation of any mandatory bargaining subject.

3. If the first two questions are answered affirmatively, whether the Board properly concluded that at the commencement of bargaining an employer's statement of opposition to, or lack of interest in, a union's substantive

contract demand constitutes a timely notice of intent to withdraw the subject from joint negotiation.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in Appendix B, *infra.* p. 1b.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT.

1. The bargaining history of the multi-employer group.

Since 1945 petitioners (collectively referred to hereinafter as the "Union"), who are local labor organizations representing food store employees, have bargained jointly with the principal retail food industry employers in the Chicago area, including Kroger (J.A. 389, 405; 10-11). While the employers bargained as a group they were not joined in any formal association, nor did they elect officers or formulate by-laws to govern the multi-employer bargaining.

The negotiations followed a fixed pattern which evolved over the years. During the early contract meetings, which were exploratory in nature, each union and each employer would have at least one representative present (J.A. 389). At all meetings, both groups acted through a spokesman or chairman. For many years a Kroger representative acted as employer spokesman (J.A. 389). As negotiations progressed, sub-committees would be formed by each group to carry on negotiations to their ultimate conclusion. Subcommittees would consist of as few as two or three members on each side and would negotiate for all employers and locals (J.A. 16-17). From time to time the employers would caucus among themselves, discuss the union's proposals and formulate a common response. Their differences,

if any, were settled in their private meetings and a common point of view was always expressed in negotiation (J.A. 389).

The negotiations always resulted in the execution of separate but substantially identical contracts by the respective employers and local unions (J.A. 390, 405). At no time during the 17-year history did any employer request withdrawal or, in fact, withdraw prior to the commencement of negotiations or during the negotiations. At no time until 1962 did any employer claim the right to reserve to individual bargaining any subject of group bargaining (J.A. 401). In isolated instances, thirteen in number over the seventeen year bargaining history, after the union and the multi-employer group had agreed to contract terms, individual employers and local unions, by mutual consent, adjusted the negotiated group contract to reflect special circumstances of no concern to the other employer members (J.A. 390-391).

For example, in 1952, Kroger and the locals representing its employees orally agreed to exclude "co-managers" where the contract's union security provisions excluded in general language "employees in a supervisory or executive capacity" (J.A. 391; 111-112, J.A. Vol. 2, pp. 118, 125, 130, 133); in 1956 after the contract had been executed by each of the employers, Kroger and the union agreed to a "pretty reasonable interpretation" of the contract phrase "regularly employed", which was otherwise not precisely defined, to mean employees who had worked a period of four weeks (J.A. 391; 164-165, J.A. Vol. 2, p. 241); in 1955, Kroger and Local 1640 agreed to modify the group contract to provide for dues check-off at a single Kroger store in Gary, Indiana because the union was having difficulty collecting dues in that particular store (J.A. 391; 102, 386-387); in 1958 National Tea negotiated a supplement to the 1957 group contract with respect to the laundering of uniforms for female employees

which differed inconsequentially from the provision on the same subject in the contract executed by the other employers (J.A. 392; 63-64, J.A. Vol. 2, pp. 209, 218, 225, 230);[2] the unions agreed to drop the "Bakery Department Head" classification from the 1954-56 contract with A & P, from the 1957-1959 contract with National Tea, and from the 1959-1961 contract with Kroger, while maintaining the classification with Associated Food Retailers (J.A. 393; 40, 73, J.A. Vol. 2, pp. 187, 195, 204, 222, 228).[3] In March, 1956, during the term of the then-existing contract, Local 1453 requested Kroger to vary the terms of the contract and to pay its members time-and-a-half for work after 6 p.m. (J.A. 393). Local 1453 made the same request to other employers, but when Kroger refused to consent to the change no variation in the contract was effectuated (J.A. 166).

2. The 1961-1962 contract negotiations

As in the past, the negotiations were preceded by the mailing of the union's uniform proposal to each employer. The proposal included a pension plan to be supported by

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[2] The separate negotiated provision in the National Tea contract provided (J.A. Vol. 2, p. 209):

> The company shall furnish the required uniforms to female employees but the employee shall be personally responsible for the uniform thereafter, including laundering and maintenance and shall return such uniform to the company upon termination of employment, if so requested.

The provision contained in the other employers' contracts stated (J.A. Vol. 2, pp. 218, 225, 230):

> Where dacron or similar type uniforms are furnished to female employees, such uniforms shall be laundered by the employee.

[3] In each instance, the unions agreed to drop the classification when the individual employer ceased to operate an unwrapped bakery goods department in its stores, thereby rendering the classification obsolete (J.A. 31-32, 180). Associated Food Retailers continued to operate unwrapped bakery departments and to employ persons in the "Bakery Department Head" classification (J.A. 31-32).

employer contributions to a jointly-administered fund (J.A. 198-210). At the first meeting, the Kroger representative stated that both Kroger and A & P were "not interested" in the pension proposal since each chain "had our own pension programs" (J.A. 402). During the course of the next several months of bargaining, the employers on two separate occasions presented the union with counter-proposals which did not include pensions and orally advised the union that the industry was opposed to pensions (J.A. 48-49, 50, 141, 212-230). When Kroger stated that it had never entered into a collective bargaining agreement containing a pension provision, the union replied that it intended a uniform settlement on an industry basis and that Kroger was bound by the results of the joint negotiations (J.A. 75-76).

At the twelfth bargaining session, on February 22, 1962, employer-spokesman Quirk stated that the industry might offer a proposal covering pensions which would not include all employers. The union repeated its earlier statement that it was negotiating a uniform industry agreement (J.A. 79-80). Quirk then suggested that the Kroger representative, who was not present at the meeting, be given an opportunity to state his position. At the next meeting the Kroger representative declared that Kroger would not agree to any contract which included a pension plan. He stated that while Quirk was authorized to negotiate for Kroger on other matters, the authorization would not include the subject of pensions (J.A. 403). The union representatives stated their disagreement with Kroger's position and the next morning the other members of the employer group reached agreement with the union on a contract containing a pension provision. The Kroger representative then stated that his company did not feel bound by the agreement and proposed as a basis for settlement with Kroger the industry agreement minus the pension provision. The union advised Kroger that it was negotiating on an industry-wide basis, that it intended the settle-

ment to apply to all employers and that it did not wish to negotiate a separate agreement with Kroger (J.A. 83-84, 127-128). On April 12, all employers, with the exception of Kroger, signed the agreement (J.A. 68-69).

B. The board's decision and order

Upon the foregoing facts, the Board, in agreement with the result reached by the Trial Examiner, found that Kroger did not violate Section 8(a)(5) and (1) of the Act by refusing to sign the contract agreed to by the other employers and by insisting upon separate negotiation of the union's pension proposals (J.A. 394). The Board concluded that Kroger and the union negotiated in 1961-1962 with the clear understanding that Kroger would not be bound by the results of joint negotiations and would be privileged to insist upon separate bargaining of any issue. The Board predicated this conclusion upon what it termed Kroger's having "made clear from the outset that it would not agree to a pension plan even if other employers did so agree" and the history of individual modifications in the joint agreements (J.A. 394). In the Board's view, in refusing to be bound by the agreement reached by the other employers with the union, Kroger was merely exercising "a prerogative established by past practice." Accordingly, the complaint was dismissed. The Board found it unnecessary to decide whether or not Kroger's actions precluded a finding that the appropriate unit for bargaining was the multi-employer unit (J.A. 395). For the purpose of decision, the Board's opinion assumed the existence of a multi-employer unit.[4]

[4] Absent an assumption that a multi-employer unit was appropriate, it would have been unnecessary for the Board to determine that Kroger had a prerogative to insist upon individual negotiation of the pension proposal. In its brief to the court of appeals, p. 14, the Board acknowledged that a unit determination "is a necessary predicate to a finding of a Section 8(a)(5) violation" and that the Board "assumed for the purpose of its decision herein that the multi-employer unit alleged as appropriate in the complaint was appropriate for the purposes of collective bargaining."

C. The decision of the court of appeals

The Court of Appeals for the District of Columbia affirmed the decision of the Board. Like the Board, the court found that the instances of "individual modifications" disclosed the mutual understanding that any party to the joint negotiations could insist upon individual negotiations on any subject. However, the court reasoned that Kroger had to exercise its prerogative of insisting upon individual bargaining "by timely action taken in good faith." The Court stated:

> "Had Kroger sat through the joint sessions with no intimation of its purpose with respect to pensions, we would have a different case. This would be especially true if the course of the negotiations suggested that the Union might have been weakening or trading off some of its other demands in the hope of getting agreement on pensions. One may not seek the benefits of joint bargaining without risking exposure to the burdens."

The court concluded that Kroger was relieved of the burdens imposed upon it by joint bargaining because at the outset of negotiations, it expressed its opposition to a jointly administered pension plan and never waivered from this position during the course of negotiations. The court found that its opposition to pensions was taken in good faith and that it did not mislead the unions as to its "position on the question of whether the group could bind it on the pension issue."

REASONS FOR GRANTING THE WRIT

1. This Court has recognized that multi-employer bargaining is "a vital factor in the effectuation of the national labor policy of promoting labor peace through strengthened collective bargaining." *N.L.R.B.* v. *Truck Drivers Local No. 449*, 353 U.S. 87, 95. Since that time it may be fairly estimated that the number of employees covered by collective bargaining agreements negotiated with multi-employer

groups has increased significantly.[5] In *Truck Drivers*, the Court affirmed the Board's balancing of the competing employer-employee interests presented there in favor of the employers' defensive tactics of locking out their employees when threatened with whipsaw strikes. The Board grounded its decision upon the employers' need to utilize the lock-out as a means of withstanding union economic pressure intended to destroy the integrity of the multi-employer unit. In the Board's view, the unit's integrity in turn rested upon "the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship." *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447, 448. In its brief to this Court in *Truck Drivers* (pp. 23-26), the Board argued that employer solidarity in the form of multi-employer bargaining was worthy of preservation against the divisiveness of whipsawing because the employer members of the group have "one contract to administer"; by "presenting a common front on bargaining issues employers are better able to obtain uniform agreement . . . and thus prevent union exploitation of differences among them"; by negotiating as one they "preserve the unity which is the purpose of bargaining as a group"; and finally, multi-employer bargaining is "an effort by the employers to standardize employment conditions." Recognizing the validity of the Board's argument when presented

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[5] In *Truck Drivers*, the Court noted that in 1956 approximately 4 million employees were covered by such contracts. In 1961, a sample of 1,733 major agreements (i.e. contracts covering one thousand or more workers) covering only 8.3 million of the 18 million employees working under union-negotiated contracts disclosed 1,619 multi-employer agreements encompassing 3.9 million workers. *Major Union Contracts in the United States*, 1961, U.S. Department of Labor, BLS Bul. No. 1353, p. 4. Countless thousands of smaller employers engage in multi-employer bargaining. In the Retail Clerks International Association alone, it has been estimated that between 60% and 79% of its membership is represented under multi-employer agreements. *Collective Bargaining Structure; The Employer Bargaining Unit.* BLS Rep., p. 10.

in that context, the Court noted that employer-members of a multi-employer bargaining group have a legitimate interest in the group's preservation, for it exists "as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from non-uniform contractual terms." *N.L.R.B.* v. *Truck Drivers, supra,* at 96.

In conformity with *Truck Drivers,* the Board has since consistently held that an essential element of a multi-employer bargaining unit is an unequivocal manifestation between individual employers, either by express agreement or implied by their conduct, of an intent to be bound in future collective bargaining by group rather than individual action.[8] In the instant case, as affirmed by the court of appeals, the Board's erosion of that standard constitutes a radical departure from the concept of multi-employer bargaining which underlay the Court's decision in *Truck Drivers.*

At issue here is whether an employer-member who chooses to continue as a member of a multi-employer bargaining unit may nonetheless insist upon individual negotiation of a particular mandatory subject of bargaining. We submit that the two courses of action are mutually inconsistent, thus requiring that the case be remanded to the Board. In *Anderson Lithograph, supra,* at 920, the Board held that to permit an employer-member to "qualify or reject an agreement made by the multi-employer group with which he was affiliated would render the widely recognized practice of multi-employer bargaining virtually valueless." Assuming *arguendo* that on this record a pre-

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[8] *Anderson Lithograph Co.,* 124 N.L.R.B. 920 (1959), *enforced sub nom, N.L.R.B.* v. *Jeffries Banknote Co.,* 281 F.2d 893 (C.A.) 9; *Kasco Trucking Corp.,* 133 N.L.R.B. 627 (1961); *Detroit Window Cleaners Union,* 126 N.L.R.B. 63 (1960); *Walker Electric Co.,* 142 N.L.R.B. No. 134; *Belleville Employing Printers,* 122 N.L.R.B. 350, 353; *Morgan Linen Service, Inc.,* 131 N.L.R.B. 420; *Northern Nevada Chapter, Inc.,* 131 N.L.R.B. 550, 552 fn. 3.

rogative to insist on individual negotiations was established by past practices, the Board reaches two basically inconsistent conclusions. The Board holds on the one hand that a multi-employer bargaining unit existed, and on the other hand permits the negotiation of contracts by each employer-member of the group which could differ one from the other in all of their substantive terms. Bargaining of this fashion does not evidence the "employer solidarity" which was judged worthy of preservation in *Buffalo Linen*. There will be no "uniform agreement to administer"; no "standardization" of contractual terms; and no effort to present "a common front" to labor. In short, the integrity of the unit, which heretofore the Board and this Court have declared to be the foundation stone of multi-employer bargaining, is destroyed. All that remains is an effort on the part of employers to use what has the surface appearance of multi-employer bargaining as a device to withstand whipsawing. It is readily apparent, however, that without the unit's integrity the justification for the anti-whipsaw lock-out disappears, at least with respect to strikes which clearly have been called over issues withdrawn from group bargaining. Practical problems of great moment are created by the rationale which gives birth to this new concept of multi-employer bargaining. These problems, some of which are enumerated below, create an uncertainty and confusion that will disrupt the industrial peace now shared by millions of employees and thousands of employers in multi-employer units.[7] We wish to emphasize that without predictable and easily identifiable limits, informal multi-employer bargaining will be damaged, for the cost of bargaining failure in terms of legally un-

[7] For example, if an employer-member withdraws one mandatory subject, offers to bargain as to that subject, but insists at the very least upon obtaining the jointly negotiated contract in all other respects, would the union be guilty of refusing to bargain by its unwillingness to execute such a contract? Does the union have an option to insist upon the employer's total withdrawal from the unit, or does the union have to bargain with both the group as to

certain strikes and lock-outs is too high a cost to pay. We do not suggest that at each contract reopening employers and unions could not agree to bargain in this fashion consistent with the obligations imposed upon them by Sections 8(a)(5) and 8(b)(3) of the Act. We do submit, however, that such bargaining would constitute merely joint negotiation for the sake of the parties' convenience; it cannot support a finding of multi-employer bargaining as that phrase has been given meaning by *Truck Drivers* and the decisions of the Board.

2. The Board, as affirmed by the court below, plainly erred in holding that the 13 minor contract modifications in the past gave rise to the parties' implied intent to permit each employer to refuse to execute the jointly-negotiated contract and to insist instead upon individual negotiation of any term not to his liking. The Board and the Court ignored the following undisputed facts: 1) each of the modifications was negotiated after all employer-members had either executed uniform contracts or completed negotiations for uniform contracts; 2) in no instance did either the unions or any employer-member refuse to execute the jointly-negotiated agreement and insist upon separate negotiation of any modification; 3) whenever the parties could not agree to a modification, the uniform jointly-negotiated contract remained operative (J.A. 391, modification No. 3, 393, modification No. 13); and 4) most sig-

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group subjects and the individual employers as to withdrawn subjects, all the while bargaining with the group through the normal process of compromising or abandoning many of its demands in order to obtain agreement on the very subject which has been withdrawn? Would the withdrawal of a single subject by one employer cause other employers to be reluctant to bargain on that subject and thus ultimately break down free bargaining if more than one employer withdraws different subjects? What are the consequences of partial withdrawal on strikes and defensive lock-outs with respect to the withdrawing employer, the other employer-members, or the group at large? If partial withdrawal is permitted, may the employees of that employer constitute a separate appropriate unit?

nificantly, none of the modifications agreed to involved basic cost items such as wages, hours, or employees' benefits. In short, the modifications clearly evidence nothing more than an intent to make routine adjustments, by mutual consent, in order to tailor the joint agreement to special conditions which are not of general interest to all the employer-members of the group and which do not affect the competitive position of any member. None of the modifications decreased the cost of administering the contract to any single employer *vis-a-vis* the other members of the group, and thus did not create "competitive disadvantage resulting from non-uniform contractual terms" (*Buffalo Linen, supra,* at 96). Plainly, the modifications were merely housekeeping details and thus constituted accommodations accorded either to individual employers or to local unions to reflect isolated conditions of a specialized nature. In these circumstances, no warrant exists in the record for the Board to conclude that the parties' past conduct implied an intent to permit unilateral insistence upon separate negotiation of a basic cost item over the repeated protests of the union that all employer-members were bound by the results of the joint negotiation.

Routine contract adjustments are commonplace in the practice of multi-employer bargaining. See, for example, *Furniture Employees Council,* 96 NLRB 1002; *Hazel-Atlas Glass Co.,* 59 NLRB 706; *Cohn-Goldwater Mfg. Co.,* 55 NLRB 1164; *Fairbanks Dairy,* 146 NLRB 111. The court of appeals fell into error by concluding that the Board's decision promotes flexibility in bargaining and meets, on a case-by-case basis, problems of "infinite variety" (App. 10a-11a). To the contrary, flexibility is destroyed, for employers and unions will be required to forego individual contract adjustment of local, routine problems rather than risk undermining their mutually desired objective of substantive contract uniformity. In this respect, the Board's decision, if permitted to stand, may also impair the vitality of single-employer bargaining on a multi-plant basis where

there has been a long history of single plant negotiation of particular subjects in order to better reflect local conditions.

Moreover, the holding of the court below is contrary to the decision of the Ninth Circuit in *Pacific Coast Association of Pulp and Paper Manufacturers* v. *N.L.R.B.*, 304 F.2d 760 (C.A. 9). There, the local unions and the employer-members of a multi-employer group had negotiated over pensions at the local level for thirteen years without the subject ever having been bargained about during group negotiations. In 1959, the unions insisted upon group bargaining on pensions, but the association declined in reliance upon the past practices and understanding of the parties. The Ninth Circuit held that the multi-employer group could not collectively withdraw a mandatory subject of bargaining from joint negotiation and insist upon negotiation of the subject at the individual employer level. The court noted that multi-employer "bargaining cannot be bifurcated . . . unilaterally."[8] We submit that the decision of the court below presents a clear conflict between circuits. Unilateral insistence upon separate negotiation by a single employer is no more privileged than unilateral insistence upon individual bargaining by employer-members collectively.

3. Finally, even assuming that a prerogative was established by past practice, the court of appeals recognized that more than past practice alone was necessary to relieve Kroger of its bargaining obligation, but the court erred in concluding that Kroger had made a timely withdrawal of the pension issue (App. A, *infra*, pp. 8a-10a). The record clearly reflects that at the start of negotiations Kroger, as well as A & P, merely stated its lack of interest in, or opposition to, granting pensions and not that it withdrew the subject from joint bargaining. Kroger's position was

[8] In distinguishing *Pacific Coast* the court below erroneously regarded the case as merely one where the employers refused to recognize a subject as a mandatory subject of bargaining.

clearly the industry position for it was not until the twelfth bargaining session when the industry retreated from its position that Kroger made any statement indicating partial withdrawal. Until that time all the employers joined in either oral or written declarations, by virtue of their counter-proposals, that they opposed the inclusion of pensions in the contract. The Board's conclusion that opposition to a union demand evidences an intent to reserve a prerogative to insist upon separate negotiations is plainly erroneous.

We anticipate that the Solicitor General and the Board will oppose the granting of this petition. If such opposition occurs, it cannot be squared with their statements to the Court this term in *N.L.R.B.* v. *Brown*, certiorari granted, 32 L.W. 3243, No. 558. There, the Court has granted the Solicitor General's and the Board's petition for a writ of certiorari on their plea (Petition, p. 1.) that "although the precise issue is novel, the importance of multi-employer bargaining makes it desirable that this court promptly correct the misapplication of its decision in the *Truck Drivers* case." In *Brown*, the Solicitor General and the Board thought that the narrow question presented there called for review by the court because it will "determine one of the basic rules for multi-employer bargaining," and thus significantly affect the national labor policy. We submit that the issues presented here are at least of equal concern. The Board and the court below have radically departed from this Court's view of multi-employer bargaining as expressed in *Truck Drivers*. Anti-whipsaw lock-outs arise only after multi-employer bargaining has failed; the instant case presents a ready vehicle to clarify the rights and obligations of the parties while bargaining continues so that they might be better able to avoid the statutorily-declared evil of industrial unrest. In sum, what are the basic obligations of multi-employer bargaining needs clarification equally as much as the consequences of such bargaining upon lock-outs.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 22, 1964

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,726

RETAIL CLERKS UNION, No. 1550, ET AL., RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

AND

THE KROGER COMPANY, INTERVENOR

On Petition to Review and Set Aside an Order of the National Labor Relations Board and Remand Cause to Board

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Decided January 23, 1964

Mr. S. G. Lippman, with whom *Mr. Russell Specter* was on the brief, for petitioners. *Mr. Tim L. Bornstein* also entered an appearance for petitioners.

Mr. Warren M. Davison, Attorney, National Labor Relations Board, with whom *Messrs. Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *Peter M. Giesey,* Attorney, National Labor Relations Board, were on the brief, for respondent. *Mr. James C. Paras,* Attorney, National Labor Relations Board, also entered an appearance for respondent.

Mr. J. Mack Swigert, of the bar of the Supreme Court

of Ohio, *pro hac vice*, by special leave of court, with whom *Mr. Frank H. Stewart* was on the brief, for intervenor.

Before FAHY, BURGER and MCGOWAN, Circuit Judges.

MCGOWAN, *Circuit Judge*: The petitioners here, Retail Clerks International Association, AFL-CIO, and a number of its local unions, (hereinafter sometimes collectively referred to as the "Union"), seek to set aside an order of the National Labor Relations Board dismissing a complaint against The Kroger Co., a food retailing chain. The complaint charged Kroger with violations of Sections 8(a) (1) and (5) of the National Labor Relations Act[1] for failing to execute a collective bargaining agreement embodying the agreements reached between the Union and certain other food retailing employers assertedly linked with Kroger in a multi-employer bargaining unit. This latter phenomenon is non-statutory in character, and thus lacks the definiteness in terms of nature and obligation which it might have if Congress had dealt expressly with it. The facts, always im-

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[1] 61 Stat. 136, 73 Stat. 519 29 U.S.C. 151 *et seq.* The sections immediately involved are:

§8(a). " It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title. "

And see § 7

> " Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title. "

portant, become more so when the relevant legal concept is blurred; and so we turn to them forthwith.

I

Kroger has, since 1945, bargained with certain local unions in the Chicago area in association with other retail food chains. The employer group has not been formally institutionalized in any way, in the sense that there are no organizational arrangements, constitutions or articles of association, rules of procedure, dues or fees. There is no evidence that any employer has explicitly delegated authority to anyone else to act for it in a binding manner. The practice has been for the Union to submit contract proposals to each employer individually. Thereafter, representatives of each employer meet to discuss the proposals, first among themselves and then as a group with Union representatives. The outcome of these bargaining sessions was the execution of separate contracts between the Union and each employer. Although substantially similar in nature, these contracts have, as discussed more fully hereinafter, a history of variations designed to implement special arrangements between a particular employer and the local representing its employees.

In 1961, in accordance with past practice, the Union gave the employers separate notices of contract reopening. The first group meeting occurred on October 26. A labor relations officer of Kroger, one Marvin Saunders,[2] represented it at that meeting. The Union proposed a pension plan for inclusion in the contract—the first time this subject had been advanced in the annual negotiations. Saunders immediately

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[2] Although never formally designated as such, Saunders had functioned for some years as spokesman for the employers in the group discussions. Prior to the 1961 negotiations, he had informed the other employers that his other commitments would prevent his continuing to so act in the future. He was however, induced to serve at the first meeting, but thereafter he was replaced in this role by Mr. Quirk of National Tea.

advised the Union that Kroger, because of its own pension and profit-sharing plan of long standing, would not be interested in the Union's proposal. The same was said to be true of A & P. Throughout the ten succeeding bargaining sessions (from November 11, 1961 to February 16, 1962), the employers continued to resist the pension proposal. On February 22, at the twelfth session and one in which Kroger was not personally represented, the Union was informed by Mr. Quirk that all employers were willing to give wage increases but some remained negative on the pension issue. When the Union representative responded to this by saying that the Union considered that each employer would be bound by any agreement reached, Quirk then stated that he would have to confer with the other employer representatives on this matter before he could proceed any further. At the next meeting, on February 24, when the Union reiterated its position that all employers would have to be bound by the agreement, Quirk replied that the Union had better state its position in this regard directly to the Kroger representative. The Kroger representative was then called into the room, and he stated explicitly that no one was authorized by Kroger to agree to a pension plan and that Kroger would not be bound by any such contract no matter who else might agree to it. Kroger then withdrew from the meeting and, at approximately 1:00 A.M., on February 25, the Union and the other employers reached agreement upon terms which included a pension provision.

The Kroger representative, upon being invited to re-enter the meeting to be advised of this result, reiterated his position that Kroger would not sign a contract which included a pension plan. He stated Kroger's willingness either to accept all of the agreed terms expect for pensions, or to carry on further bargaining for a wholly new agreement. The other employers finally signed contracts with the Union on April 12. Some meetings were held between Kroger and the Union after February 24, but they were unavailing and, on April 19, Kroger was struck.

II

The ultimate issue in this case is, of course, whether Kroger's conduct, as detailed above, constituted a bad faith refusal to bargain with the Union, or an interference with the bargaining rights of the employees, within the meaning of Sections 8(a) (1) and (5) of the Act. The Union argues, first, that if there was in fact a multi-employer bargaining unit, then Kroger, as a member of it, is legally bound to accept the agreements issuing from the group negotiations. Perhaps in recognition of the amorphous nature of the legal concept of "multi-employer bargaining unit," the Union does not stand solely on this ground but urges further that, at the least, a member of such a unit can avoid the consequences of group negotiation only by a timely and effective withdrawal from the group, which, so it says, Kroger did not do.

The Board—rightly, we think—did not undertake to decide this case by first deciding whether or not to pin the label of "multi-employer bargaining unit" on Kroger and the other employers, and then to draw automatic conclusions from such a premise. Rather, it found what the facts were with respect to the joint negotiations carried on in 1961 and before, and measured Kroger's asserted statutory derelictions in the light of those facts. It concluded that there has been a practice of collective discussion between a number of employers, including Kroger, on the one hand, and the Union, including its locals, on the other, eventuating customarily over the years in a series of substantially similar, albeit separate, contracts between the individual employers and the individual locals. But it found from the evidence that there had been no monolithic adherence by the members of either group to the objective of uniformity in the contracts as a whole. It was from these facts, and not from any legal abstraction, that it inferred an understanding between the parties that these group discussions need not result in identical agreements and that, accordingly, an

individual employer or an individual local might, by timely action taken in good faith, reserve its position on a particular matter in such manner so as not to be bound at all events by what a majority of their associates might agree to.

In reviewing the result the Board reached by this means, we think our function is limited to determining whether there was sufficient evidence in the record to support the Board on both these points, that is to say, whether the group bargaining arrangements here involved were understood by the participants in them as operating to require contract uniformity under all circumstances, and whether, if there be no such understanding, Kroger acted with appropriate speed and clarity so as not to mislead the Union under the particular circumstances of the 1961 negotiation.

With respect to the first of these questions, it is not claimed by anyone that the emloyers were bound as between themselves to act as a unit, or that Kroger, in allegedly defaulting its responsibilities to the Union, is also breaking faith with its fellow employers. This, of course, does not conclude the matter before us, because it is Kroger's conduct *vis-a-vis* the Union, not the other employers, which is at issue. But it has significance to this extent, namely, the Union has to imply Kroger's submission to be bound by group action from a course of conduct. It cannot, as stated above, identify such submission in any express commitment by Kroger, either to the Union or to the other employers.

The Board was unable to draw the implication of implied submission from the record. There was, of course, the threshold fact that the employers, over and above the absence of any formal organization or definition of inter-employer rights and obligations, had always signed separate contracts with individual locals. The Board's chief reliance, however, was on the showing made as to the number and extent over the years of variations in these contracts as a result of non-group, employer-local, discussions. In its De-

cision the Board lists 13 instances, spanning the decade before this controversy arose, of what it found to be "individual adjustments between separate employers and separate union *(sic)* which varied the jointly negotiated terms and conditions of employment." It was from this evidence that the Board conluded that

> "during the entire period of multiemployer bargaining, individual employers and individual unions had negotiated individual modifications to the jointly negotiated agreements without protest from other parties to the agreements. The evidence, we believe, justifies a finding . . . that in jointly negotiating for a collective-bargaining agreement, the parties mutually understood that individual variances in the agreement could be negotiated by the individual parties."

We have no occasion to characterize this finding as arbitrary or lacking in substantial record foundation. The 13 instances, not surprisingly, vary considerably in their relative importance, and this prompts the Union to decry their significance *in toto*. But we agree with the Board that they do present a pattern of conduct, stretching over several years and participated in by many different parties on both sides of the fence, which does serve to illuminate the states of mind in which these groups periodically faced each other across the bargaining table. In the light of this history, the assumptions common to both must have been that, although brought together by a joint interest in uniformity, neither group marched as latter-day musketeers bound by irretrievable pledges of solidarity. All sought as much uniformity as possible, but their ideal in this regard was relative, not absolute.

This is strongly suggested by some of the instances recounted by the Board. In 1952 Kroger reached a separate accord with the Union whereby co-managers in the Kroger stores were excluded from the compulsory union membership provisions in their current contract. In 1955 a union local asked for and got from Kroger alone a dues check-off,

something not provided in the current contracts. In 1960 Kroger and Local 1460 entered into an agency shop arrangement with accompanying check-off. In 1958 National Tea Company worked out a supplemental agreement on uniforms for its female employees, differing from the provisions on this subject in the contracts of the other employers. In 1959 the joint discussions resulted in contracts containing a clause under which indemnification was provided the employers for any claims flowing from the agency shop; this was then omitted from the A & P contract. A & P refused to sign the 1959-61 agreement until a change was made in the health and welfare provisions. The Union agreed, and the A & P contract, as signed, differed from the others. When National Tea and Associated Food Retailers learned of this modification, they asked for a similar change in their contracts and received it; a like request from Kroger did not result in any modification. Other incidents in the list bolster the impression, given by the foregoing, that there was a long-standing tradition of separate dealing between each employer and the Union, and justified the Board in deciding that there was no misunderstanding by the parties that all negotiating discussions would be confined to the group sessions and that all contracts would be the same.

This is not to say that there was no recognizable framework of joint bargaining between the Union and the group of employers that included Kroker. Obviously there was; and it would be foolish to say that that framework imposed no limitations of any kind upon Kroger's independence of action. Had Kroger sat through the joint sessions with no intimation of its purpose with respect to pensions, we would have a different case. This would be especially true if the course of the negotiations suggested that the Union might have been weakening or trading off some of its other demands in the hope of getting agreement on pensions. One may not seek the benefits of joint bargaining without risking exposure to the burdens. It is certainly possible to conceive of circumstances in which the refusal of a party to joint

negotiations to sign the resulting agreement could be said to fall short of the statutory command that there be good faith bargaining.

The Board was, however, alert to this possibility, and this brings us to the second phase of our limited judicial inquiry. At the very first negotiating session, the Kroger representative stated clearly and emphatically that Kroger, because it had had its own plan in effect for years, would not agree to the setting up of a new and jointly-administered plan. Kroger never wavered from this position, which the Board found to have been taken in good faith and not for mere trading purposes. This finding is solidly buttressed by the fact that Kroger ultimately took a strike on this issue.

Neither was the Union misled in any way as to Kroger's position on the question of whether the group could bind it on the pension issue. As noted above, at the first session Kroger stated that it was not interested in the Union's pension proposal. More importantly, at the twelfth joint session on February 22, 1962, the employer spokesman informed the Union that, although all employers were willing to increase wage rates, some would not agree to pensions. The Union then stated its position to be that any one employer would be bound by the agreements reached with the others. When this position was reiterated at the February 24th meeting, the employer spokesman advised the Union that its position in this regard should be communicated directly to Kroger forthwith.

Thus it was that, at the meeting on February 24, a Kroger representative was called in and he stated that no one was authorized to bind Kroger by an agreement which included a pension provision. Kroger thereupon left the meeting. After further bargaining, the employer group, *sans* Kroger, reached agreement with the Union on terms which included a pension plan. Kroger then advised the Union that it would not sign a contract embodying such an agreement, but it did express its willingness to accept the other agreed terms,

without the pension plan. It did not limit itself to this, however, which might have exposed it to the charge of taking benefits without burdens. It expressly signified its readiness to negotiate afresh, with all terms being regarded as open.[3]

III

Pension plans are, of course, appropriate subjects for collective bargaining, and no employer is privileged to refuse to discuss them. This has been settled since *Inland Steel Co. v. NLRB*, 170 F2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). But this dispute does not involve that issue. The question here is not whether Kroger properly refused to bargain about pensions at all,[4] but whether it was entitled to insist that its bargaining on this subject be untrammeled by group action on the subject. Translated into the language of the statutory infractions with which it is charged, the issue is whether such insistence by Kroger unlawfully interfered with the collective bargaining rights of its employees, or constituted an unlawful refusal to bargain with the Union.

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[3] Three subsequent meetings took place between Kroger and the Union, but the last two of these came after the intervention of the Federal Mediation and Conciliation Service in a futile effort to head off the strike.

[4] The Union has relied heavily in its brief and argument upon *Pacific Coast Association of Pulp & Paper Manufacturers*, 133 N.L.R.B. 690 (1961), *enforced*, 304 F.2d 760 (9th Cir. 1962). This appears to us, however, as an instance of a failure by employers collectively to recognize pensions as a mandatory subject of bargaining. At issue, certainly, was the conduct of the employer group in excluding pensions from the otherwise comprehensive authority delegated to the bargaining agent. Here, the group not only bargained about pensions but reached an agreement; and the complaint about Kroger is not that it would not bargain about pensions at all but only that it insisted on carrying on this bargaining on an individual basis and with reference to its own existing plan and not to a new jointly administered plan.

The Board has appraised the conduct of Kroger in the light of factual findings amply supported by evidence in the record, and it has concluded that that conduct does not transgress the statutory mandates. In reaching this conclusion, the Board has adhered to the salutary practice it has established of examining these multi-unit situations on a case-by-case basis. Group activity in the collective bargaining field has no statutory matrix by which the contours of the resulting rights and obligations can be deductively defined. It is clear that group activity can and does range over a wide spectrum of habits, practices, and understandings, explicit and implicit, which makes generalization more hazardous than usual.

Confronted with this prospect of infinite variety, the Board has wisely looked to the facts of the particular case in deciding whether a complaint about reprehensible conduct is justified. It has, on occasion, found those facts to be such as to warrant a determination that the statute has been infringed. See, for example, *Anderson Lithographic Co.*, 124 N.L.R.B. 920 (1959), *enforced sub nom, NLRB v. Jeffries Banknote Co.*, 281 F.2d 893 (9th Cir. 1960); *Kasco Trucking Corp.*, 133 N.L.R.B. 627 (1961); *Detroit Window Cleaners Union*, 126 N.L.R.B. 63 (1960); and *Walker Electric Co.*, 142 N.L.R.B. No. 134 (p. 6), 53 LRRM 1233, 63-1 CCH Lab. Cas. ¶12,398 (1963). These cases, however, exhibit a common factual trait (i.e., a failure by a party to group bargaining to communicate in a timely fashion to the other side a purpose to reserve a particular subject matter for individual action) which has caused the Board to conclude that there has been a failure in bad faith to conform to the obligations of the statute.

In the same spirit of allegiance to fact rather than form, the Board has probed beneath the surface of group action to find that a course of conduct by a particular employer, although eventuating in dissociation from the collective result, was fully consistent with the requirements of the

Act. *J & H Food, Inc.*, 139 N.L.R.B. 1398 (1962) (involving facts very similar to the instant case and also involving Kroger); *Indiana Limestone Company*, 136 N.L.R.B. 697 (1962). There, as here, the evidence showed such a mélange of group and individual negotiation and agreement, carried on over such a period of time, as to suggest a commonly accepted flexibility in the format of bargaining which would not automatically outlaw every departure from the fold. Where, also as here, that departure is not surreptitious, or accompanied by a refusal to bargain on an individual basis, the Board may well conclude that the accused employer has not failed to meet the standards which Congress has set for him in treating with his employees.[5] Unless and until Congress prescribes definite—and different—ground rules for group bargaining generally, those which the Board has applied in this particular instance do not impress us as lacking in either reason or fairness.

The action of the Board in dismissing the complaint is left undisturbed.

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[5] We do, of course, take into consideration the expertise of the Board. Its continuous exposure to the business of extracting a kernel of probable truth from special factual settings, which the Board observes more often and more closely than do we, gives it a facility and understanding worthy of respect. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 207

RETAIL CLERKS UNION, 1550,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, et al.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

THE KROGER CO.,

Intervenor.

BRIEF OF THE KROGER CO., INTERVENOR, IN OPPOSITION TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The decision and order of the National Labor Relations Board dismissing the complaint against the Intervenor in its entirety (JA 388-395), including the Intermediate Report of the Trial Examiner recommending dismissal of the complaint in its entirety (JA 396-407), is reported at 141 NLRB 564 (1962). The opinion of the Court of

Appeals, which the Petitioners seek to review, is reported at 330 F. (2d) 210, and is also reproduced in Appendix A annexed to the Petition for Writ of Certiorari.

JURISDICTION

The Petitioners have invoked the jurisdiction of this Court under 28 U. S. C. 1254(1) and Section 10(f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the court below erred in affirming dismissal by the National Labor Relations Board of a complaint filed by the Petitioners alleging that Kroger, the Intervenor Employer, had refused to bargain collectively in good faith with the Petitioners in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended.

STATUTES INVOLVED

The provisions of the National Labor Relations Act, as amended, involved in this proceeding are Sections 7 and 8(a)(1) and (5) (61 Stat. 136; 29 U. S. C. §§ 151, et seq.). Copies of these sections have been annexed to the Petition for Certiorari as Appendix B thereof.

STATEMENT OF THE CASE

The Petitioners charged, and the complaint issued by the National Labor Relations Board against the Intervenor, The Kroger Co., a food retailing chain, alleged that Kroger had violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, by failing to execute a collective bargaining agreement embodying certain agreements reached between the Petitioners and certain other food retailing employers assertedly linked with Kroger in a multi-employer bargaining unit.

In deciding whether Kroger had refused to bargain in good faith by declining to execute the same collective bargaining agreement as its competitors, the Board reviewed the history of bargaining from 1945 until 1962, when the alleged violation occurred. Based upon this review of the bargaining history, as disclosed by voluminous testimony and documentary evidence, the Board concluded, in agreement with its Trial Examiner, that:

> "The evidence, we believe, justifies a finding . . . that in jointly negotiating for a collective-bargaining agreement, the parties mutually understood that individual variances in the agreement could be negotiated by the individual parties. Accordingly, in refusing to accede to the pension plan agreed to by other employers and in insisting upon separate negotiations of this issue [Kroger] exercised a prerogative established by past practice and did not therefore refuse to bargain in violation of Section 8(a)(5) and (1) of the Act." (JA 394)

The Board did not purport to establish any new principle of law. It simply concluded that under the circumstances disclosed by the evidence, Kroger had no obligation to sign the same agreement as its competitors and did not refuse to bargain in good faith when it declined to do so and requested separate negotiation of the pension issue. Kroger requested separate negotiation of this issue because Kroger, unlike its competitors, already had a generous profit sharing retirement plan in operation on a company-wide basis.

The Petitioners, acting under the provisions of Section 10(f) of the Act, appealed the Board's dismissal to the Court of Appeals for the District of Columbia. The court duly reviewed the Board's decision and concluded that it was supported by substantial evidence on the record considered as a whole. Accordingly, the court ruled that,

"The action of the Board in dismissing the complaint is left undisturbed." (Petition for Certiorari, Appendix A, page 12a)

REASONS FOR DENYING THE WRIT

The basic question presented is whether the Court of Appeals erred in sustaining the decision of the Board. Under the Act, the scope of review in NLRB cases is a narrow one. The standard to be applied by the Courts of Appeals and by this Court, under the 1947 amendments to Sections 10(e) and (f) of the Act, was summarized by this Court in its unanimous opinion in *NLRB* v. *Pittsburgh Steamship Co.* (1951) 340 U.S. 498; 95 L.E. 479, at pages 502-503, as follows:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari. . . .' Taft-Hartley Act § 10(e), 61 Stat. 148, ch 120, 29 USC (Supp III) § 160(e). Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' Layne & Bowler Corp. v. Western Well Works, 261 US 387, 393, 67 L ed 712, 714, 43 S Ct 422; Revised Rules of the Supreme Court of the United States, Rule 38 (5). The same

considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.'"

In *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.* (1949), 336 U.S. 271; 93 L.E. 672, this Court also emphasized, at page 275, that:

"A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

In the instant case, both the Trial Examiner and the Board itself, after thorough review of an extensive record, found as a matter of fact that:

". . . during the entire period of multi-employer bargaining, individual employers and individual unions had negotiated individual modifications in the jointly

> negotiated agreements without protest from other parties to the agreements."

and that:

> "The evidence, we believe, justifies a finding, as in the *J & H Food* case, that in jointly negotiating for a collective-bargaining agreement, the parties mutually understood that individual variances in the agreement could be negotiated by the individual parties." (JA 394)

In reviewing the decision at the request of the Petitioners, the Court of Appeals for the District of Columbia made a fair assessment of the record, and concluded that there was substantial evidence in the record considered as a whole to support these findings of the Board. In so doing, the court adhered to the standards set forth by Congress in Sections 10(e) and (f), and by this Court in *NLRB* v. *Pittsburgh Steamship Co., supra.* In its opinion, the court below stated:

> "In reviewing the result the Board reached by this means, we think our function is limited to determining whether there was sufficient evidence in the record to support the Board on both these points, that is to say, whether the group bargaining arrangements here involved were understood by the participants in them as operating to require contract uniformity under all circumstances, and whether, if there be no such understanding, Kroger acted with appropriate speed and clarity so as not to mislead the Union under the particular circumstances of the 1961 negotiation." (Petition for Certiorari, Appendix A, page 6a)

The court observed that the Board had "measured Kroger's asserted statutory derelictions" in the light of the "facts" revealed in the record. The court said:

> "It was from these facts, and not from any legal abstraction, that [the Board] inferred an understanding between the parties that these group discussions need not result in identical agreements and that, accordingly, an individual employer or an individual local might, by timely action taken in good faith, reserve its position on a particular matter in such manner so as not to be bound at all events by what a majority of their associates might agree to." (Petition for Certiorari, Appendix A, pages 5a-6a)

The court found that the Board's findings were not "arbitrary or lacking in substantial record foundation." (Ibid., page 7a)

The court also observed that:

> "The Board has appraised the conduct of Kroger in the light of factual findings amply supported by evidence in the record, and it has concluded that that conduct does not transgress the statutory mandates. In reaching this conclusion, the Board has adhered to the salutary practice it has established of examining these multi-unit situations on a case-by-case basis." (Ibid., page 11a)

The court said that the Board had decided the case in the "spirit of fact rather than form" and that "the Board has wisely looked to the facts of the particular case in deciding whether a complaint about reprehensible conduct is justified." (Ibid., page 11a)

The court also emphasized, in footnote 5, that:

> "We do, of course, take into consideration the expertise of the Board. Its continuous exposure to the business of extracting a kernel of probable truth from special factual settings, which the Board observes more often and more closely than do we, gives it a facility and understanding worthy of respect. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951)."

From the foregoing, it is evident that this case presents no novel question of law. It involves no "principles the settlement of which is of importance to the public" and involves no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal." The essence of the Petitioners' contention to this Court is that there was not sufficient evidence of past practice before the Board from which the Board could properly infer that Kroger had a right under the agreement and understanding between the parties to insist upon separate negotiation of the pension issue. This is obviously a factual question not subject to review in this Court.

The only decision of this Court on which the Petitioners rely is *NLRB* v. *Truck Drivers Local Union No. 449* (1957) 353 U.S. 87; 1 L.E. (2d) 676, familiarly known as the "*Buffalo Linen* case." In that case, this Court decided that employers who are bargaining on a group basis have a right to shut down their operations in concert when a union attempts to weaken the solidarity of the group by striking less than all of its members. There is no inconsistency between the *Buffalo Linen* decision and the decision of the Board in the instant case. This case does not involve an attempt by the Union to break up a group of employers who want to bargain jointly. Also, there is no contention here that a group of empoyers has tried to divide-and-conquer an opposing union group. There is no possible inconsistency in holding that bargaining groups may not seek to undermine and destroy each other, but that individual members of bargaining groups may, with fair notice to all concerned, voluntarily withdraw authority from the group committee to represent the individual member of the group and may insist thereafter upon bargaining on an individual basis.

It is elementary that the Act itself makes no reference to multi-employer or group bargaining. Section 9(b) of the Act specifies that the "unit appropriate for the purposes of

collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Section 2(2) defines the term "employer" as including "any person acting as an agent of an employer." Thus, agency is the true basis of multi-employer bargaining. This means that a group of employers or a group of unions may lawfully bargain together and enter into agreements binding on the members of the group only so long as the committees negotiating for the groups are acting as agents of the members of the groups. In *Arden Farms* (1957) 117 NLRB 318, 319; aff. (1957) 118 NLRB 117, the Board stated:

> "It is well established that presumptively a single-employer unit is appropriate, and to defeat a claim for such a unit in favor of a broader unit a controlling history of collective bargaining on the broader basis must exist."

In *California Metal Trades Assoc.* (1947) 72 NLRB No. 120; 19 LRRM 1221, the Board said, at page 1222:

> "The broadest unit which the Board is empowered to find appropriate under Section 9(b) of the Act is the 'employer unit.' The term 'employer' is here used as defined in Section 2(2) of the Act, that is, it 'includes any person acting in the interest of an employer.' "

The Board has repeatedly held that employers are free to withdraw from multi-employer bargaining with appropriate notice at any time up until the actual conclusion of final agreement. *Texlite, Inc.* (1958) 119 NLRB 1792; enf. (CA 5; 1959) 266 F. (2d) 349; *Indiana Limestone Co.* (1962), 136 NLRB 697; *Rice Lake Creamery Co.* (1961), 131 NLRB 1270; aff. (CA D.C.; 1962) 302 F. (2d) 908; *Cooks, Waiters and Waitresses Union, Local 327* (1961) 131 NLRB 198; *Clackamas Logging Co.* (1955) 113 NLRB 229, 235; *Matter of Paschich* (1950) 91 NLRB

1552, footnote 4; *Bagley Produce Co.* (1954) 108 NLRB 1267.

Of course, a union is equally free to withdraw at any appropriate time, with notice, from participation in multi-employer bargaining. *Evening News Assoc. and Detroit Newspaper Printing Pressmen's Union Local 13* (Trial Examiner's Intermediate Report) 56 LRR 145 (June 8, 1964).

In its Petition for Certiorari, the Petitioners state, at page 12:

> "We do not suggest that at each contract reopening employers and unions could not agree to bargain in this fashion consistent with the obligations imposed upon them by Sections 8(a)(5) and 8(b)(3) of the Act."

Thus, the Petitioners acknowledge that there is not really any novel question of law involved and that group bargaining finds its basis in familiar principles of agency and contract law. The Board has found, in substance, that Kroger did not violate any agreement or understanding of the parties in insisting upon separate negotiation of the pension issue.

The only Court of Appeals decision relied on by the Petitioners in claiming a conflict between the Circuits is *Pacific Coast Association of Pulp and Paper Manufacturers* v. *NLRB* (1961) 133 NLRB 690; enf. (CA 9; 1961) 304 F. (2d) 760. There is no conflict. In the *Pacific Coast* case, the employer was a member of an employer association which was clearly authorized to represent all member companies as bargaining agent in what was admittedly a multi-employer unit. The employer committee refused to discuss the subject of pensions. The Board found this to be a violation of Section 8(a)(5). In his Intermediate Report, at page 7, lines 18-22, the Trial Examiner stated:

> "Nor is it questioned that the Association was so constituted that it had the authority to bargain on behalf of its members on all mandatory subjects of collective bargaining, and that by a vote of a majority of its members it could bind all of them in whatever agreements it reached with the Union."

In footnote 2 of its decision and order, the Board stated:

> "While an employer is not obligated to make any concession, it is required to discuss issues and make a reasonable effort to reach an agreement (Citing cases). The Respondent Association made no such effort here."

In the *Pacific Coast* case, the employers, as a group, refused to discuss the issue of pensions. In the instant case, Kroger was always willing to discuss the issue of pensions, and did negotiate the subject of pensions, both in the joint negotiations, and individually with the Union after Kroger withdrew from the joint negotiations on February 25, 1962. The issue in the instant case was not whether pensions are negotiable, but whether, under the bargaining practice which had existed in Chicago for many years, Kroger had a right to bargain this subject on an individual basis rather than a joint basis.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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July 16, 1964.

FILE COPY

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No. 307

In the Supreme Court of the United States

October Term, 1964

RETAIL CLERKS UNION 1059, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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739-147—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 207

RETAIL CLERKS UNION 1550, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–12a) is reported at 330 F. 2d 210. The Board's decision and order (J.A. 388–395) [1] are reported at 141 NLRB 564.

JURISDICTION

The decision of the court of appeals (Pet. 1a–12a) was entered on January 23, 1964. On April 9, 1964, the Chief Justice extended the time for filing a peti-

[1] "J.A." references are to those portions of the record printed for the court below. "J.A. Vol. 2" references are to a volume of exhibits filed in the court below.

tion for a writ of certiorari to and including June 21, 1964, which was a Sunday. The petition was filed on Monday, June 22, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that the parties involved in bargaining on a multi-employer basis established the practice of reserving certain subjects for individual negotiation, and that one of the parties (Kroger) properly invoked that prerogative in this case.

2. Whether, in the circumstances of this case, the Board properly concluded that Kroger's reservation of the right of individual negotiation on the subject of pensions did not violate Section 8(a)(5) and (1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in Appendix B to the petition (Pet. 1b).

STATEMENT

This case involves an unfair-labor-practice charge against the Kroger Company, a food retailing chain, growing out of Kroger's failure to execute a collective-bargaining agreement between the Union and a group of food retailers assertedly linked with Kroger in a multi-employer bargaining unit. The Board found that Kroger had not violated the Act and the

court of appeals affirmed. The following facts were found by the Board and are undisputed.

Retail Clerks Union, Locals 1550, 1540, 1504, 1453, and 98 represent employees of various grocery stores in the Chicago, Illinois, area (J.A. 389; 64-65).[2] Since 1945, Kroger Company, Atlantic & Pacific Tea Company, National Tea Company and Associated Food Retailers,[3] an association of independently owned food stores, have bargained with these local unions on a group basis. The employers, however, have no formal association, constitution, rules of procedure, dues or fees, nor have they formally designated any committee, sub-group or individual to bargain for them (J.A. 389; 97–99). Between 1945 and 1954, the procedure was for the Union to submit contract proposals to the individual employers whose representatives thereafter met as a group with the Union (J.A. 389; 116). The employer representatives "agreed as to what the response [to Union proposals] would be" (J.A. 389; 116). In 1954, because of the growing size of the employer group, Marvin Saunders, a Kroger representative, informally assumed the role of employer spokesman (J.A. 389; 96, 99–100, 116–117).

Until 1961, when the events relating to this case occurred, these multi-employer bargaining sessions resulted in the signing of separate, but substantially

[2] All of the local unions except Local 1460 are members of Retail Clerks Chicago Area Council, District 3; Local 1460 is a Gary, Indiana, Local (J.A. 389, n. 2; 8).

[3] In 1955, Eagle-Piggly Wiggly, and in 1961, Red Owl Stores, joined the group (J.A. 389, n. 2; 10–11, 42, 98).

similar, contracts between the various local unions and the individual employers (J.A. 389; J.A. Vol. 2, *passim*). Nevertheless, on at least thirteen occasions between 1952 and 1961, individual employers and the local unions representing their employees negotiated separately about matters covered by the multi-employer contract in light of special circumstances relating to less than all the members of the employer group. On all but two of these occasions, these individual negotiations resulted in modifications of the multi-employer contract pertaining only to particular employers and not to the entire group. Kroger was involved in seven of these separate negotiations, which are described in detail in the Board's opinion (J.A. 391–393).

In the fall of 1961, the Union, according to past practice, served separate notices of contract reopening upon the employers (J.A. 390; 19). The first negotiating session was held on October 26, 1961. Representatives of each of the employers were present (J.A. 390; 46). At this meeting, the Union proposed the inclusion of a pension provision in the contract; prior to this time, pensions had never been included in collective bargaining negotiations (J.A. 390; 46–47). Marvin Saunders, a Kroger official and spokesman for the employer group, immediately informed the Union that neither Kroger nor A & P, both of which had pension plans of their own for their employees, would be interested in any such jointly administered

plan (*ibid.*).[4] Throughout the following ten sessions (from November 11, 1961, to February 16, 1962), both sides continued to bargain but remained firm concerning the pension plan; the employers' proposals contained no pension provisions, while the Union continued to demand such a plan (J.A. 390; 38–50, 52).

At the eighth meeting, on February 7, 1962, Kroger representative Van Ausdall reiterated to Union representative Morris that Kroger's position with respect to pensions had not changed since the first meeting (J.A. 123, 142–143). At the twelfth session, on February 22, Joseph Quirk of National Tea Company, who had replaced Saunders as spokesman for the employers (J.A. 100, 121, 132), informed the Union that all the employers were willing to grant certain wage adjustments but that some were unwilling to agree to a pension plan (J.A. 390; 82, 128). The Union replied that its position was that each employer in the group would be bound by any agreement reached (J.A. 390; 88, 125). Quirk expressed his disagreement with this proposition and suggested that the Union inform the Kroger representative, who was not present at that meeting, of its views (J.A. 390; 82, 125). At the next meeting, on February 24, Kroger representative Van Ausdall announced that neither Quirk nor any other employer representative

[4] Kroger's nationwide retirement plan, established in 1947, was supplemented in 1951 by a profit-sharing plan. According to the terms of Kroger's plan, participation by an employee in any other group pension plan would result in the automatic exclusion of that employee from the Kroger plan (J.A. 90–91, 92–95).

was authorized to accept any agreement on Kroger's behalf which included a pension proposal and that Kroger would be bound only by an agreement to which it specifically assented (J.A. 390; 82, 88, 125–126, 142). Van Ausdall then left the meeting (J.A. 126).

Later that day, the other employers reached agreement with the Union on a contract containing a pension-plan provision (J.A. 390; 82–84). When so informed, Van Ausdall stated to the meeting that Kroger would not sign the contract as written, that it would agree to the entire contract excluding the pension provision, and that it was willing to meet with the Union, if further negotiations were necessary, to try to complete an agreement (J.A. 390; 83, 127–128). On April 12, all the employers in the group, with the exception of Kroger, signed contracts with the Union (J.A. 390; 68–69, 86).

Following the February 24 meeting, Kroger and the Union negotiated separately, but no agreement was reached.[5] On March 8, the Union filed charges with the Board, alleging that Kroger violated its bargaining obligation under the Act in refusing to sign the contract agreed to by the other employers. On April 19, it struck Kroger (J.A. 390, 396; 70).

On the basis of the foregoing, the Board found that, "during the 1961 negotiations Respondent [Kroger] made clear from the outset that it would not agree to a pension plan even if the other employers

[5] Meetings between Kroger representatives and Union officials were held on March 5, April 18, and May 3; the latter two meetings were held under the auspices of the Federal Mediation and Conciliation Service (J.A. 129–130).

did so agree. As the Trial Examiner found, this position was asserted in good faith." The Board further found that the other employers, in agreeing to a pension plan, "expressly disclaimed any authority to bind Respondent." In light of the prior history showing numerous individual variances in the jointly negotiated agreement, the Board concluded that "in jointly negotiating for a collective-bargaining agreement, the parties mutually understood that individual variances in the agreement could be negotiated by the individual parties." By insisting upon separate negotiation of the pension issue, Kroger "exercised a prerogative established by past practice and did not therefore refuse to bargain in violation of Section 8(a) (5) and (1) of the Act." (J.A. 394–395.)

The court of appeals found that there was substantial evidence to support the Board's findings that the parties understood that the group bargaining did not contemplate contract uniformity under all circumstances, and that Kroger had clearly indicated to the Union that it wanted to reserve the issue of pensions for separate negotiation. Approving the Board's conclusion that, in these circumstances, Kroger's refusal to sign the contract agreed to by the other employers did not constitute a violation of the Act's bargaining requirements, the court affirmed the Board's dismissal of the complaint (Pet. 1a–12a).

ARGUMENT

The decision below turns on its particular facts, is correct, and is not in conflict with the decision of any circuit. There is no occasion for further review.

1. Petitioners challenge (Pet. 12–15) the Board's conclusions (1) "that in jointly negotiating for a collective-bargaining agreement the parties mutually understood that individual variances in the agreement could be negotiated by the individual parties" (J.A. 394), and (2) that Kroger invoked this prerogative with respect to pensions in this case in a clear and timely fashion. This challenge raises only an evidentiary issue which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491.

In addition, substantial evidence supports both of these findings. As the court below pointed out, in light of the thirteen instances of individual negotiation in the past, "the assumptions common to both [parties] must have been that, although brought together by a joint interest in uniformity, neither group marched as latter-day musketeers bound by irretrievable pledges of solidarity. All sought as much uniformity as possible, but their ideal in this regard was relative, not absolute." (Pet. 7a.) The court added with respect to the 1961 negotiations that at "the very first negotiating session, the Kroger representative stated clearly and emphatically that Kroger, because it had its own plan in effect for years, would not agree to the setting up of a new and jointly administered plan," and that "Kroger never wavered from this position, which the Board found to have been taken in good faith and not for mere trading purposes" (Pet. 9a).

2. Petitioners further contend (Pet. 8–12) that, even if Kroger made clear at the outset of the 1961 negotiations its intention not to be bound by any group agreement on pensions, such a reservation is incompatible with the principle of multi-employer bargaining and hence should be treated as a legal nullity. This contention likewise does not warrant review. As the court below stated (Pet. 11a), "group activity in the collective bargaining field has no statutory matrix by which the contours of the resulting rights and obligations can be deductively defined." Thus, the question whether certain conduct by an individual employer is inconsistent with the principle of multi-employer bargaining has properly been left largely to case-by-case determination. The Board has not hesitated to find the Act violated when the multi-employer unit has in fact been used by an employer as a means to avoid the Act's obligation to bargain in good faith.[6] The Board and the court of appeals, however, properly found that Kroger had not done so here, in insisting on individual bargaining over pensions with the Union.

Petitioners assert (Pet. 11–12, and n. 7) that, to permit the members of a multi-employer bargaining unit to negotiate provisions which deviate from the group agreement, might hypothetically give rise to a

[6] See the cases cited by the court of appeals (Pet. 11a).

number of difficult legal problems.[7] None of the problems mentioned is present in this case, which should therefore not be the occasion for their wholly abstract consideration.

3. The cases relied upon by petitioners are not in conflict, since they have important factual distinctions. In *Pacific Coast Association of Pulp and Paper Manufacturers* v. *National Labor Relations Board,* 304 F. 2d 760 (C.A. 9) (Pet. 14), the association representing the employer group in multi-employer bargaining was, unlike the informal group in this case, a formal organization with explicit, formal authority to bargain on behalf of its members on all mandatory subjects of collective bargaining and, upon a vote of a majority of its members, to bind all of them to the agreements reached between the association and the union. 133 N.L.R.B. 690, 697. Nevertheless, the association refused to bargain about

[7] Thus, petitioners suggest that, although a strike against one member of a multi-employer unit ordinarily privileges the other members in locking out to defend the integrity of the unit against the whipsawing effect of the strike (*National Labor Relations Board* v. *Truck Drivers Local No. 449* (Buffalo Linen), 353 U.S. 87), the justification for the lockout would appear to disappear where the strike is over an item which has been withdrawn from the group bargaining (Pet. 11). Whether this is so need not be determined here, for none of the nonstruck employers resorted to a lockout. Similarly, petitioners inquire whether, in the circumstances of this case, the Union would have been guilty of a refusal to bargain had Kroger demanded that it execute the group agreement without a pension provision, and it had refused (Pet. 11, n. 7). Kroger made no such demand here, and no refusal to bargain charge was filed against the Union.

pensions, but insisted that all such bargaining take place on an individual level. This refusal by an authorized bargaining representative to bargain about a mandatory subject of bargaining was clearly an unfair labor practice on the part of the association absent any affirmative defense. The association defended on the ground that the union had contractually agreed with it to omit pensions from the subjects of bargaining. Both the Board and the court of appeals rejected this defense as a matter of fact. In the present case the charge is not against the informal employer group but against Kroger, a member of the group. Unlike the association in *Pacific Coast*, Kroger has offered to bargain with the Union about pensions and the Board and court of appeals have found on the basis of substantial evidence that by insisting upon individual rather than group bargaining Kroger has not, in light of all the circumstances, been guilty of refusing to bargain in good faith.

In *Anderson Lithograph Co.*, 124 NLRB 920, enforced *sub nom. National Labor Relations Board* v. *Jeffries Banknote Co.*, 281 F. 2d 893 (C.A. 9) (Pet. 10), the charge was, as here, against an individual employer. The employer, however, unlike Kroger in this case, failed to communicate in timely fashion its desire to reserve a particular subject for individual action. Finally, *National Labor Relations Board* v. *Brown*, pending on writ of certiorari, No. 7, this Term (Pet. 15), involves the totally different question whether the nonstruck members of a multi-employer unit exceed the limits of defense permitted by

National Labor Relations Board v. *Truck Drivers Local No. 449* (Buffalo Linen), 353 U.S. 87, when, after having locked out their employees, they resume operations with temporary replacements for their regular employees who are willing and able to work.

CONCLUSION

For the above stated reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 207

RETAIL CLERKS UNION, 1550,
RETAIL CLERKS INTERNATIONAL ASSOCIATION
AFL-CIO, *et al.*, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*
and
THE KROGER CO., *Intervenor*

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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IN THE

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OCTOBER TERM, 1964

No. 207

RETAIL CLERKS UNION, 1550
RETAIL CLERKS INTERNATIONAL ASSOCIATION
AFL-CIO, *et al.*, *Petitioners*
v.
NATIONAL LABOR RELATIONS BOARD, *Respondent*
and
THE KROGER CO., *Intervenor*

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

This reply brief is directed to a departure in the Board's rationale which has come to light after the Board and the Court of Appeals decided the instant case and after petitioners filed the Petition for a Writ of Certiorari. The Board's new rationale arose by virtue of its decision in a decertification case which was a companion proceeding to the instant case. The decertification proceedings involved the same parties, the same issues, and the same record as in the unfair labor practice case.

At approximately the same time the petitioners filed unfair labor practice charges which gave rise to the instant case, an individual employed by Kroger filed a decertification petition with the Board (App. AA, *infra*, p. 2aa).[1]

[1] The Board's Decision and Order in the decertification case is reprinted as Appendix AA to this Reply Brief, *infra*, pp. 1aa-13aa.

The same basic issue was presented in each case. In the decertification case, the issue involved was whether a multi-employer bargaining unit was an appropriate unit for collective bargaining or, as the decertification-petitioner contended, whether only a single unit of Kroger's employees was appropriate "and that a multi-employer unit never existed" (App. AA, *infra*, p. 6aa). In the unfair labor practice case, the Board was presented with the question of whether Kroger failed to bargain in good faith in an appropriate unit when it unilaterally withdrew the subject of pensions from group bargaining. The unit question was necessarily involved in that determination for if the appropriate unit had been a single employer unit, Kroger would have not violated its good faith bargaining obligation by insisting on individual bargaining with respect to pensions. The Board decided the unfair labor practice case first and without explicitly resolving the unit determination, it found that Kroger had not refused to bargain because of a past practice which had given rise to a prerogative to bargain individually on any mandatory subject. In the decertification proceedings the Board ordered a hearing thereon after reversing the Regional Director who had dismissed the decertification petition.[2] At the hearing on the decertification petition, the parties stipulated that the entire record in the unfair labor practice case constituted the record in the decertification proceedings. The unfair labor case proceeded to review by the Court of Appeals and on June 22, 1964, petitioners filed the instant Petition for a Writ of

[2] The litigation of the unfair labor practice charges proceeded in a normal time sequence. However, decision in the decertification case was stayed until the Board decided the unfair labor practice case. The Board issued its Decision and Order in the latter case on March 18, 1963. On March 26, 1963, the Board reversed the Regional Director's dismissal of the decertification petition and ordered a hearing (App. AA, *infra*, p. 3aa). On September 28, 1963, the hearing was held but it wasn't until August 27, 1964, that the Board issued its Decision and Order in the case (App. AA, *infra*, pp. 3aa, 13aa).

Certiorari. On August 27, 1964, the Board, by a three to two decision, issued a Decision and Order in the decertification case which, in our view, reflects a basic retreat from the rationale adopted in the unfair labor practice case decision.

1. To the extent that in the unfair labor practice case the Board's decision, standing alone, presents certiorari-worthy issues, we pray that the Writ be granted. Those issues have been fully presented in the Petition.

2. To the extent that the Board's decertification decision modifies and establishes a different rationale for its decision below, we pray that the Petition for a Writ of Certiorari be granted and the cause be remanded to the Court of Appeals for the District of Columbia in order to enable it to reconsider its decision in the light of the Board's decertification decision.[3] We submit that the decision below cannot stand side by side with the decision in the decertification proceedings. In the unfair labor practice case, the Board held that by virtue of a prerogative established by past practice Kroger could unilaterally withdraw from multi-employer bargaining any mandatory bargaining subject and refuse to sign the jointly-negotiated agreement. In its decertification decision, the Board did not adopt that same rationale. Instead, the Board held that Kroger could insist on individual bargaining only with respect to "limited matters" and that while group action is called for "about all matters of general concern", it decided in effect that the establishment of an industry-wide pension plan is one of the "limited problems of an individual employer" about which the group negotiations need not be burdened (App. AA, *infra*, pp. 6aa-7aa). The Board did not offer any reasons in support of the latter holding.

It is apparent that this position—now the law of the case—reflects a basic retreat from the rationale adopted in the

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[3] Cf. *People ex rel. Whitman* v. *Wilson*, *318 U.S. 688* and cases cited there; *Busey* v. *District of Columbia*, 319 U.S. 579; *Amer* v. *Superior Court*, 334 U.S. 813.

unfair labor practice decision.[4] The Board has in effect acknowledged the soundness of petitioners' basic contention with respect to the incompatibility of prerogatives to unilaterally withdraw mandatory subjects of bargaining and multi-employer units. But the Board's temporizing suffers from yet another vice for now the central issue is whether the establishment of an industry-wide pension plan is a matter of only "limited" concern and, as such, subject to unilateral withdrawal by an employer who is bargaining within the confines of a multi-employer bargaining unit. The Court of Appeals was not called upon to pass on this question, nor has it ruled on the propriety of the Board's decision in the unfair labor practice case with the benefit of consideration of the Board's new position in the decertification proceedings. This presents the anomaly that the Board's rationale which the Court of Appeals sustained has been later overruled by the Board itself.

For these reasons, we submit that the case be remanded to the Court of Appeals for reconsideration of its opinion in the light of the Board's later decision in the decertification proceedings.

Respectfully submitted
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September 18, 1964

[4] The two dissenting Board Members recognized this departure in theory and found that the existence of a prerogative to withdraw any subject of mandatory bargaining negated the existence of a multi-employer bargaining unit. Unwilling to abandon its position with respect to unilateral withdrawal, the majority of the Board Members temporized the principle to permit unilateral withdrawal of only "limited" matters.

APPENDIX AA

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

THE KROGER CO., *Employer* and ALLEN ALSIP, *Petitioner* and RETAIL CLERKS UNION, LOCALS 1550, 1540, 1504, 1460, 1453, AND 98 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, *Unions*	Case No. 13-RD-494

DECISION AND ORDER

Upon a petition and an amended petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Albert Kleen, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.

3. No question affecting commerce exists concerning the representation of employees of the Employer within the

meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act for the reasons stated below:

The Petitioner seeks to decertify the above-named Unions in a single-employer unit consisting of certain employees employed in all of the Employer's stores located in the Chicago Metropolitan District. The Employer and United Retail Workers Union, Intervenor, in agreement with the Petitioner, assert that this single-employer unit is appropriate. Intervenor Retail Clerks International Association, AFL-CIO, hereinafter called International, and Retail Clerks Union, Locals 1550, 1540, 1504, 1460, 1453 and 98, hereinafter called Locals, contend that only a multiemployer unit is appropriate.

The essential facts are as follows:

On March 8, 1962, the Locals affiliated with the International filed charges in Case No. 13-CA-4742 alleging that the Employer violated Section 8(a)(5) and (1) by refusing to be bound by, and by refusing to sign a collective-bargaining agreement reached in joint bargaining with a group of retail grocery store operators. On the following day, the Petitioner filed the instant decertification petition naming the International as the union currently recognized, and describing the appropriate unit as all employees including part-time employees in the stores of the Employer's Chicago Metropolitan District, excluding store manager, meat department employees, guards, and all professional and supervisory employees as defined in the Act.

On May 4, 1962, a complaint issued in Case No. 13-CA-4742, alleging, *inter alia,* that the Employer was a member of the multiemployer bargaining unit. On May 9, 1962, on the basis of this allegation in the complaint, the Regional Director dismissed the instant decertification petition as seeking an election in an inappropriate unit. Thereafter,

the Petitioner filed with the Board a Request for Review of this dismissal.

On March 18, 1963, the Board issued its Decision and Order[1] in Case No. 13-CA-4742, finding that the Employer had exercised a prerogative established by past practice in insisting on individual bargaining as to certain matters, and had not, therefore, violated Section 8(a)(5) and (1) by refusing to be bound by or to sign the collective-bargaining agreement which had been jointly negotiated by the Locals and the employers' group. The Board, however, found it unnecessary to decide in that case whether the parties' practice of individual adjustments precluded their having established an appropriate multiemployer unit.[2]

Thereafter, on March 26, 1963, the Board reversed the Regional Director's dismissal of the instant decertification petition and ordered a hearing thereon. On August 28, 1963, the Petitioner amended the petition by substituting the Locals as the unions currently recognized and sought to be decertified. On September 28, 1963, a hearing was held on the petition, during which hearing the parties stipulated that the entire record in *The Kroger Co.*, 141 NLRB 564, be incorporated into and be made a part of the instant proceeding.

The record shows that since 1945, the Employer, together with other retail grocery stores operating in and about Chicago, has bargained collectively with the Locals on a group basis.[3] Although they have no formal association,

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[1] *The Kroger Co.*, 141 NLRB 564, affirmed 330 F. 2d 210 (C.A. D.C.).

[2] 141 NLRB at p. 569, footnote 4.

[3] In 1945, the employer group consisted of the Employer, Atlantic & Pacific Tea Co., National Tea Company, and Associated Food Retailers, an association of local independently owned retail food

constitution, dues, fees, or binding rules of procedure, the employers have bargained together for many years. The Locals usually submitted contract proposals to individual employers who then met as a group with the Locals. Each employer was represented by one or more individuals who caucused prior to meeting with the Locals to discuss the Locals' proposals and to agree upon a common response. One representative then assumed the role of spokesman for the employer group. As a result of these joint negotiations, separate but substantially similar collective-bargaining agreements were executed between the Locals and respective employers. While these past contracts have been substantially similar in the 17-year period, there have been 14 individual adjustments between separate employers and separate Locals which caused some variation in the terms and conditions of the jointly negotiated contracts.

In the fall of 1961, notices of contract reopening were, as usual, served upon the employers. At the first negotiating session the Locals proposed, *inter alia*, a pension plan. The spokesman for the employer group informed the Locals that the instant Employer and A & P had pension plans of their own for their employees and would not be interested in one which was jointly administered. Throughout the following ten bargaining sessions (from November 11, 1961, to February 16, 1962), both sides continued to bargain but remained firm in their positions concerning the pension plan. At the 12th bargaining session held on February 22, 1962, the spokesman for the group informed the Locals that although

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stores. In 1955, Eagle-Piggly Wiggly, and in 1961, Red Owl Stores joined the group.

Although there were other locals participating in joint negotiations during the early history of bargaining, the union group was reduced to the six locals due to the merger of several smaller locals. All six of the locals are members of Retail Clerks Chicago Area Council, District 3, except Local 1460, which is a Gary, Indiana, Local.

all of the employers were willing to make certain wage adjustments, some of them were unwilling to agree to a pension plan. The Locals' representative then took the position that the parties were bargaining jointly and each member of the group would be bound by any agreement reached. At the next meeting, on February 24, 1962, when the Locals' representative reiterated the unions' position, the Employer's representative stated categorically that no other employer representative was authorized to accept any agreement on the Employer's behalf which included pension proposals, that the Employer would be bound only by an agreement to which it specifically assented, and that it would not agree to a contract which included a pension plan. At this same meeting, which continued on to February 25, the Locals and the remaining employers reached agreement on terms of a new contract, including a pension plan. The Employer's representative, however, refused to accept the pension proposal, stated that the Employer was anxious to reach a settlement with the Locals, proposed as a basis of settlement the same agreement reached by the other parties with the exception of a pension plan, and also expressed the Employer's willingness to meet further with the Union to bargain for a wholly new agreement in an attempt to reach a settlement. Thereupon, the Employer's representative left the meeting. On April 12, 1962, the Locals and all participating employers save the Employer held a further meeting for the purpose of conforming certain contract items. The Employer's representative, although invited, did not attend this meeting. Thereafter, within a 2-day period, all parties except the Employer executed a contract. Following the meeting of February 24-25, the Employer and the Locals met and unsuccessfully attempted to resolve the issue as to the pension plan.[4] Because they were unable to reach an agreement, the Locals struck the Employer on April 19, 1962.

[4] Meetings between representatives of the Employer and the Locals were held on March 5, April 18, and May 3, 1963.

On June 9, 1962, the Employer and the Locals executed a strike-settlement agreement. This agreement provided, *inter alia*, that the Employer and the Locals would execute a collective-bargaining agreement containing all of the terms and conditions contained in the contract between the Locals and the other employers with exception of the pension plan and reserved this issue to the ultimate outcome, including appeals, of the litigation in the unions' unfair labor practice case against the Employer (Case No. 13-CA-4742).[5] On July 2, 1962, the Locals and the Employer executed a collective-bargaining agreement in accordance with the terms of their strike-settlement agreement. With regard to the pension plan, this agreement provided, in effect, that the Locals' pension proposal would be included in the contract if it is finally ruled "that the Employer should have executed or is required to execute a collective-bargaining agreement substantially similar to that signed by" the other employers.

As stated above, the Petitioner contends that only a single-employer unit is appropriate and that a multiemployer unit never existed. In this regard, the Petitioner argues that the past bargaining history shows that the Employer never gave the employer group the power to negotiate for and to bind it and had not unequivocally manifested a desire to be bound by group rather than individual action. Petitioner further contends that the history of individual adjustments negates the establishment or existence of a multiemployer unit. We do not agree. The necessary implication of this argument is that in multiemployer bargaining a union and an individual employer member of the group are automatically precluded from negotiating separately on limited matters of peculiar concern to the individual employer, unless

[5] On January 3, 1964, the United States Court of Appeals for the District of Columbia dismissed the petition filed by the Locals and the International to review and set aside the Board's dismissal of the complaint against the Employer (141 NLRB 564) and affirmed the Board's order in that case. 330 F. 2d 210.

such employer withdraws from the group. This is patently unrealistic. The problems of each member of a multiemployer group are understandably not always identical. While it may be to the best interest of the employers and labor organizations involved to bargain as a group about all matters of general concern—the obvious reason for the formation and continuation of any multiemployer unit—it may likewise be in the best interest of all concerned not to burden the group negotiations with the limited problems of an individual employer. Hence, we do not believe that the exercise of a mutually recognized privilege to bargain individually on limited matters, as in the present case, is inconsistent with the concept of collective bargaining in a multiemployer unit.[6] Moreover, to hold that such limited separate bargaining invariably negates the existence of, or destroys, an established multiemployer bargaining unit would be to grant to an employer all the benefits of multiemployer bargaining without assuming any of its concomitant obligations.

We have repeatedly held that a multeimployer unit is appropriate in circumstances such as are here present, even though the employer may not have specifically delegated to an employer group the authority to represent it in collective bargaining or given the employer group the power to execute final and binding agreements on its behalf,[7] or where some of the contracts have not been signed by all members of the group.[8] What is essential is that the employer mem-

[6] In this respect the situation is not unlike the one where bargaining in a multiplant unit leaves certain matters for local determination at each separate plant. Cf. *General Motors Corporation*, 120 NLRB 1215, 1220-1221 and cases cited in footnote 10 thereof.

[7] *Quality Limestone Products, Inc.*, 143 NLRB No. 62, pp. 4-5; *Krist Gradis, et al.*, 121 NLRB 601, 610; *Cleveland Builders Supply Co., et al.*, 90 NLRB 923, 924; *Bellingham Automobile Dealers*, 90 NLRB 374.

[8] *Krist Gradis, et al., supra; Capitol District Beer Distributors Association, et al.*, 109 NLRB 176; *Fish Industry Committee*, 98 NLRB 696.

ber has indicated from the outset an intention to be bound in collective bargaining by group rather than by individual action.[9]

Here, the facts clearly show such an intention on the part of the Employer. We do not believe that the Employer could, or did, rely upon the past bargaining history of some individual negotiations to the extent of assuming, except for limited matters, that it would not otherwise be bound by group action. In fact, to the contrary, it indicated its intent and willingness to be so bound. As noted above, after the Locals and the remaining members of the employer group reached an agreement, the Employer, although willing to bargain with the Locals for a wholly new agreement, was still willing to accept all of the terms and conditions of this agreement, except the pension plan, which all of the parties, including the Employer, reached as a result of joint negotiations. The fact that in past bargaining over a 17-year period 14 limited individual adjustments arose from apparently dozens of agreements, all of which were jointly negotiated, does not, in itself, establish a future unequivocal intent not to be bound by group action generally. Nor do we reach a different conclusion because of the reservation as to the Locals' pension proposal contained in the collective-bargaining agreement entered into by the Locals and the Employer on July 2, 1962. We find this reservation to be nothing more than an exercise of the Employer's privilege, acquiesced in by the Union, to insist upon limited separate negotiations, which privilege, we have already stated, is consistent with the concept of multiemployer bargaining. Accordingly, on the basis of the above facts and on the record as a whole, we find that the Employer had indicated an intention to be bound in collective bargaining by group rather than by individual action.

[9] *Capitol Beer Distributors Association, et al., supra* at 179.

The Petitioner also contends, as does the Employer,[10] that even if a multiemployer unit exists, the Employer timely and effectively withdrew from such unit on February 25, 1962. We do not agree. The record establishes that the Employer evinced no clear intent actually to withdraw from joint bargaining until the last bargaining session on February 25, 1962, and shortly before the Locals and the employer group reached an agreement.[11] Although the Employer had indicated prior to this time that it was not interested in the Locals' pension proposal, the Employer neither sought nor obtained the Union's consent to its withdrawal from multiemployer bargaining,[12] but, on the contrary, continued to engage in group bargaining thereafter without manifesting any intent to withdraw from the group or giving the Locals any clear indication that the employer group was not bargaining in behalf of the Employer.

Nor is the Employer's withdrawal or Union acquiescence therein demonstrated by the conduct of the Locals and the Employer in subsequently entering into separate negotiations with respect to the pension proposal. This action was entirely consistent with the parties' mutual understanding

[10] The Employer also contends that in *The Kroger Co.*, the Board adopted the Trial Examiner's finding to the effect that on February 25, 1962, the Employer "withdrew from such [joint] negotiations" (141 NLRB at p. 571), and that the Board is therefore estopped from now finding otherwise. We do not agree. A reading of that case clearly shows, contrary to the Employer, that the Board adopted the findings, conclusions and recommendations of the Trial Examiner only "insofar as they are consistent" with the Board's findings and conclusions, and that the Trial Examiner's finding in this regard was not adopted because it was inconsistent with those findings and conclusions.

[11] For a similar holding on almost identical facts, see *Anderson Lithographic Company, et al.*, 124 NLRB 920, enfd. sub. nom. *N.L.R.B.* v. *Jeffries Banknote Company*, 281 F. 2d 893 (C.A. 9).

[12] It is also clear from the record that the Employer gave no notice to any other members of the employer group that it intended or desired to withdraw from the group.

that individual variances could be negotiated by individual parties. As we have stated above, such individual bargaining of a limited nature is not inconsistent with the concept of bargaining in a multiemployer unit.

Based on the above, we find that the Employer, by attempting without the Union's consent [13] to abandon group negotiations shortly before an agreement had been reached, did not withdraw from multiemployer bargaining in a timely and effective manner, and therefore continued to remain a member of the multiemployer unit.[14]

Accordingly, we find that only a multiemployer unit is here appropriate, and that a single-employer unit limited to the petitioned-for employees employed in all of the Employer's stores located in the Chicago Metropolitan District is not appropriate, and we shall dismiss the petitions herein.[15]

ORDER

IT IS HEREBY ORDERED that the petitions filed herein be, and they hereby are, dismissed.

Dated, Washington, D. C., Aug. 27, 1964.

FRANK W. MCCULLOCH, *Chairman*
JOHN H. FANNING, *Member*
GERALD A. BROWN, *Member*
(SEAL) NATIONAL LABOR RELATIONS BOARD

[13] *Ice Cream Council, Inc.*, 145 NLRB No. 71. Although Member Brown does not rely upon the cited decision he agrees that there was no effective withdrawal in this case.

[14] *McAnary & Welter, Inc.*, 115 NLRB 1029, 1031; *The Milk and Ice Cream Dealers of the Greater Cincinnati, Ohio, Area, et al.*, 94 NLRB 23, 25; Cf. *Detroit Window Cleaners Union, Local 139*, 126 NLRB 63; Accord: *Cosmopolitan Studios, Inc.*, 127 NLRB 778, 779, enfd. 291 F. 2d 110 (C.A. 2); *Walker Electric Co.*, 142 NLRB 1214.

[15] Inasmuch as we have dismissed the petitions herein because they sought to decertify an inappropriate unit, we deem it unnecessary to reach or consider the various contentions raised by the Locals and the International with respect to the contract bar issue.

Members LEEDOM and JENKINS dissenting:

In dismissing the petition herein, our colleagues have found that a multiemployer unit existed and that the Employer did not effectively withdraw from that unit. Based thereon, our colleagues have further found that the Petitioner, by seeking a decertification election in a single-employer unit, filed his petitions in an inappropriate unit. We do not agree. The proper determination of this case depends, we believe, upon the correct answer to the basic point of inquiry of whether the group bargaining arrangements involved herein were understood by the parties to be binding on each other and to require contract uniformity under all circumstances, thereby establishing a multiemployer bargaining unit.

It is clear that because multiemployer bargaining is and always has been consensual in nature [16] the Board cannot create multiemployer units, but may only recognize them as appropriate once they come into being through the express or implied intent of the parties. Here, the record clearly shows that the several employers, including the Employer, never expressly conferred upon the group of employers the power to bind them by negotiations.[17] The necessary intent, then, if it is to be found, must be implied from the group's and the Employer's course of conduct. In our view, no such implication is warranted. To the contrary, the record shows that on 14 separate occasions in the past employers departed from joint negotiations and entered into separate bargaining with the apparent approval of the other employers and of the Locals. It is obvious, therefore, that the parties understood that their bargaining arrangements did not require contract uniformity. In addition, since these acquiesced-in departures resulted in separate, dissimilar agreements, it is

[16] *Rayonier, Inc.*, 52 NLRB 1269, 1274-1275.

[17] *Bennett Stone Company*, 139 NLRB 1422, 1424; *California Metal Trades Association*, 72 NLRB 115.

also obvious that no party was "locked in" during the negotiation of agreements. It is of no moment that the separately negotiated agreements were substantially similar to those reached as a result of group action. The test is not one of degree, but rather one of intent. Accordingly, we believe that these departures which continued over a substantial period of time and which resulted in dissimilar agreements warrant the conclusion that the employers never intended to be bound in the future by group rather than by individual action.[18]

Further, the evidence clearly shows that the Locals were not misled in any way as to the Employer's position on the question of whether the group could bind the Employer on the pension issue. Here, the employer group and the Locals knew throughout the entire course of bargaining that the Employer opposed the pension proposal. The Locals also knew, based on past practice, that if the Employer's intent not to be bound by the results of the jointly negotiated agreement containing the pension proposal was further manifested by its refusal to agree to such agreement, the usual procedure would be to divorce the Employer from the group and to negotiate separately on this subject. We are, therefore, satisfied that the Employer took clear and timely steps throughout to apprise the Union of its position and that by adopting an individual course of action, the Employer did not deviate from the established procedure of bargaining.[19] Accordingly, in the light of the past bargaining practices and the present bargaining situation, we would find that such group bargaining as took place was for the convenience

[18] *Bennett Stone Company, supra,* at 1424; *Morgan Linen Service,* 131 NLRB 420, 422; *Chicago Metropolitan Home Builders Association, supra.*

[19] *The Kroger Co.,* 141 NLRB 564; compare, for example, *Quality Limestone Products, Inc.,* 143 NLRB No. 62, where the Board stated: "... they (the employers) have never taken any steps to adopt an individual course of action prior to the positions taken during the course of this proceeding. ..."

of the employers and unions involved, and was not undertaken with the intention of establishing a multiemployer unit.

It logically follows that as a multiemployer unit did not exist, there was no necessity for the Employer to "withdraw" from such nonexistent unit. Accordingly, we would not dismiss the petition, but would, instead, direct an election in the petitioned-for unit limited to employees of the Employer.

Dated, Washington, D. C., Aug. 27, 1964.

BOYD LEEDOM, *Member*
HOWARD JENKINS, JR., *Member*
NATIONAL LABOR RELATIONS BOARD